



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 20, 2004

Ms. Patricia J. Acosta  
Assistant District Attorney  
Thirty-Fourth Judicial District  
500 East San Antonio Street, 2<sup>nd</sup> Floor  
El Paso, Texas 79901-2420

OR2004-3178

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199830.

The Office of the District Attorney of the Thirty-Fourth Judicial District (the "district attorney") received a request for any information "pertaining to the arrest, investigation and trial of cause number 20010D03179." You state that you have released some of the responsive information. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requestor asserts that the requested information has previously been inspected by the requestor and the attorney for the criminal defendant in this case. You only acknowledge that the defendant's attorney was allowed to review the state's case file in compliance with court-ordered discovery. This office has ruled that exchange of information among litigants in informal discovery is not considered a voluntary release of information. *See* Open Records Decision No. 579 (1990). Likewise, when a governmental body discloses information because it reasonably concludes it has a constitutional obligation to do so, it can still invoke the law enforcement exception. *See* Open Records Decision No. 454 (1986); *see also Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution is required to provide defense with all potentially exculpatory evidence). You make no representation as to whether this information has been previously released to the requestor. Whether this information has previously been voluntarily released is a fact question that cannot be addressed in the ruling

process. *See* Attorney General Opinion JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). We therefore must rely on a governmental body's representations with regard to such issues. Based on the district attorney's representation, we conclude that the district attorney has not previously released any of the requested information that it now seeks to withhold to a member of the public. We will therefore address the district attorney's claim under section 552.108 of the Government Code.

Next, we note that Enclosure 6 contains court-filed documents, which are expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See* Gov't Code § 552.022(a)(17). Thus, we will address your section 552.101 arguments with regard to the section 552.022 information found in Enclosure 6.

You assert that Enclosures 3, 3A, and 6 contain biometric identifiers that are confidential under sections 560.001, 560.002, and 560.003 of the Government Code.<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information deemed confidential by statute. Sections 560.001, 560.002, and 560.003 provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
  - (A) the individual consents to the disclosure;

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<sup>1</sup>We note that you assert sections 559.002 and 559.003 of the Government Code for this information. These sections were renumbered by the Regular Session of the Seventy-eighth Legislature, effective September 1, 2003. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2 (78), 2003 Tex. Sess. Law Serv. 4140, 4144.

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the district attorney must withhold this information, which we have marked in Enclosures 3, 3A, and 6 under section 552.101 in conjunction with section 560.003 of the Government Code.

You assert that Enclosures 5 and 6 contain criminal history record information ("CHRI") that is excepted from disclosure under section 552.101 in conjunction with federal law or section 411.083 of the Government Code. CHRI obtained from the National Crime Information Center (the "NCIC") or the Texas Crime Information Center (the "TCIC") is confidential under federal and state law. Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"); *see also* Open Records Decision No. 565 at 10- 12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See id.* at 10-12.

Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov't Code § 411.089(b). Thus, CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Likewise, CHRI held by the Texas Department of Public Safety or another criminal justice agency must be withheld from the public as

provided by subchapter F of chapter 411 of the Government Code. Furthermore, law enforcement information compiled by a governmental entity that relates to whether a particular individual is a criminal suspect, arrested person, or defendant takes on a character that implicates the individual's common-law right to privacy in a manner that the same information in an uncompiled state does not.<sup>2</sup> See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision No. 616 at 2-3 (1993). The district attorney must withhold the CHRI in Enclosures 5 and 6 that is (1) confidential under federal law or subchapter F of chapter 411 of the Government Code or (2) private pursuant to *Reporters Committee* under section 552.101.

You assert that Enclosure 4 contains information that is excepted from disclosure under section 552.108 of the Government Code.<sup>3</sup> Section 552.108 provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

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<sup>2</sup>Section 552.101 also encompasses the doctrine of common-law privacy.

<sup>3</sup>We note that although you make a work product assertion under subsections 552.108(a)(3)(A) and (B), the proper subsections to assert for the attorney work product privilege are subsections 552.108(a)(4) and (b)(3).

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You state that the information in Enclosure 4 consists of notes and memoranda in the state's case file that were prepared by an attorney representing the state. Upon review of Enclosure 4, we conclude that the information was either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude that the information in Enclosure 4 may be withheld from disclosure under subsections 552.108(a)(4) and 552.108(b)(3).

You assert that Enclosure 3 contains information that is subject to section 552.130 of the Government Code. Section 552.130 excepts information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. The district attorney must withhold the Texas motor vehicle information you have marked under section 552.130.

In summary, the district attorney must withhold the information you have marked under section 552.130. The district attorney must withhold the information we have marked under section 552.101. The district attorney may withhold Enclosure 4 under section 552.108. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amy Peterson", with a long, sweeping flourish at the end.

Amy D. Peterson  
Assistant Attorney General  
Open Records Division

ADP/sdk

Ref: ID# 199830

Enc. Submitted documents

c: Mr. James D. Lucas  
303 Texas Avenue, Suite 806  
El Paso, Texas 79901  
(w/o enclosures)